

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION
OF ROPER CONSTRUCTION, INC.
FOR AN AIR QUALITY PERMIT
NO. 9295, ALTO CONCRETE BATCH PLANT**

No. AQB 21-57(P)

**ROPER CONSTRUCTION, INC.'S
REPLY IN SUPPORT OF MOTION IN LIMINE**

Applicant Roper Construction, Inc. (“Roper”) submits this Reply in Support of its January 25, 2022 Motion *in limine* (“Motion”) to exclude evidence on water rights, water sources, water consumption or well permit applications for the property (collectively, “water issues”). Ranches of Sonterra (“Sonterra”) submitted its Response in Opposition on February 2, 2022 (“Response”).

Roper requested an Order from the Hearing Officer *in limine* to exclude Sonterra’s documents, testimony, or other evidence related to water issues, as proposed in Sonterra’s January 19, 2022 Statement of Intent and February 2, 2022 Statement of Intent to Present Rebuttal Testimony. Sonterra’s Response to the Motion is replete with bare argument, but no supportive authority contrary to Roper’s position. As stated in the Motion, the evidentiary standard for admission of evidence in an air permit hearing is relevancy. 20.1.4.400(B)(1) NMAC. Relevant evidence is evidence having “any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” NMRA 11-401. Nothing in Sonterra’s response contradicts this assertion.

As we explained, the Secretary’s determination to approve or deny Roper’s application is centered on whether emissions from the facility, as permitted, will cause or contribute to an exceedance of applicable ambient air quality standards or applicable prevention of significant deterioration (“PSD”) increments, or whether the facility will comply with all of the applicable

regulations. *See* 20.2.72.208 NMAC (establishing the grounds for NMED denial of an air permit application).

As identified in the application, NO_x, CO, VOCs, PM₁₀, and PM_{2.5} will be emitted at the facility. The impacts of those emissions are evaluated using EPA approved air dispersion models. 20.2.72.203.A(4) NMAC. The water source, well permit application, water rights and amount of water are not relevant to the emissions or the modeling analysis.

The only substantive applicable regulation identified is 20.2.61.109 NMAC, which sets a 20 percent opacity limit for all combustion equipment. The water source, well permit application, water rights and amount of water are not relevant to the emissions from combustion sources or compliance with the opacity limit.

Sonterra asserts that since water will be used to add moisture to various materials to prevent dust emissions, the water source, well permit application, water rights and amount of water are relevant. Response at 1-2. However, while the moisture content of materials is relevant to the amount of dust that may be generated, the water source, well permit application, water rights and amount of water are not part of that determination. If Sonterra's reasoning were to be followed, there would be no limit to what the Hearing Officer could consider in issuing a recommendation on the permit, including the source of the electricity (necessary for the operation of certain equipment), natural gas (combusted by the heaters and other combustion equipment), as well as the raw material (aggregate and sand) at the site would be relevant. Those have never been relevant to the Department's determination to issue or deny an air permit application.

Sonterra takes four pages to explain why it believes the water issues are relevant, but avoids any discussion to address and overcome the lack of statutory and regulatory authority for the

Secretary to consider the water issues when issuing his decision on the air permit. Sonterra attaches as Exhibit 5 in its Response an email from Rebecca Roose, Deputy Secretary of the Environment. In the email, Deputy Secretary Roose states, “Water issues, such as water rights, sources and consumption, are not relevant to the proceeding and have no bearing on the final decision.” Response, Exhibit 5. The only argument Sonterra provides in response to this email is that the New Mexico Environment Department’s (“NMED”) position that it cannot consider the water issues is contradictory to what is required in the draft permit – achieving compliance with applicable air quality standards through the use of a wet dust suppression system. Response at 3.

Sonterra’s interpretation of NMED’s authority is misguided. Certainly, NMED has the authority to impose reasonable conditions on Roper’s operation necessary for achieving compliance with applicable air quality regulations, ambient air quality standards, and PSD increments. 20.2.72.210 NMAC. Here, NMED’s Air Quality Bureau (“Bureau”) has done so through a permit condition requiring the use of a wet dust suppression system. Based on the draft condition, if Roper does not have the requisite amount of water to operate the dust suppression system, it is prohibited from operating. It is through this mechanism that the Bureau can ensure that Roper achieves compliance with applicable air quality standards. The Bureau confirms this position in its rebuttal testimony of Kathleen Primm. NMED Rebuttal Ex. 4, 2-4 (Primm Rebuttal). Further, Roper’s modeling established that ambient air quality standards would be met without the need to add moisture.

Sonterra has not provided sufficient explanation for why its testimony about the water issues is relevant to the issuance of an air permit. Further, they have failed to point to any statutory or regulatory authority that permits the Secretary to consider the water issues as part of his decision on the air permit application.

In addition to the testimony that Roper identified in its Motion, Roper notes that Sonterra submitted rebuttal testimony by Mr. Martinez addressing the water issues. (Sonterra Rebuttal SOI at 4-6). Roper also seeks to exclude the introduction of Mr. Martinez's rebuttal opinions related to the water issues.

For the reasons stated above, and in its January 25, 2022 Motion, Roper moves for entry of an Order prohibiting Sonterra from presenting evidence involving the water source, well permit application, water rights and amount of water, including Roper's water rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2022, a true copy of the foregoing ***Roper Construction Inc.’s Reply in Support of Motion in limine*** was served via electronic mail to the following:

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